

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF MIDCOM COMMUNICATIONS,)	
INC. AND GE CAPITAL COMMUNICATIONS)	
SERVICES CORPORATION, D/B/A GE EXCHANGE)	CASE NO. 96-078
AND D/B/A GE CAPITAL EXCHANGE FOR)	
APPROVAL OF A TRANSFER OF ASSETS)	

O R D E R

On February 29, 1996, MIDCOM Communications, Inc. ("MIDCOM") and GE Capital Communications Services Corporation, d/b/a GE Exchange and GE Capital Exchange ("GE") (hereinafter referred to as "Joint Applicants") filed an application ("Joint Application") pursuant to KRS 278.020(4) and KRS 278.020(5) requesting Commission approval of the transfer of "a portion of" GE's customer accounts to MIDCOM [Joint Application, at 1]. On April 22, 1996, Joint Applicants filed a document entitled Clarification of Application ("Clarification"), to which the affidavit of Bradley D. Toney, Assistant Counsel for MIDCOM, is attached. The Clarification and attached affidavit ("Affidavit") address certain language in the transfer documents filed with the Joint Application which appeared to indicate that the closing of the transaction had already taken place. According to the Affidavit, at 2, "[a]ny provision of the Transfer Documents to the contrary notwithstanding, the transfer . . . to MIDCOM has not occurred." The Affidavit also states that GE continues to provide service to the customers whose accounts are the subject of the proposed transaction. Id.

MIDCOM, a Washington corporation, is authorized to provide intrastate telecommunications services in Kentucky pursuant to the Commission's Order dated October 8, 1992, in Case No. 92-138.¹ GE, a Georgia corporation, is authorized to provide intrastate telecommunications services in Kentucky pursuant to the Commission's Order dated November 15, 1993, in Case No. 93-259.² Both MIDCOM and GE are utilities subject to the Commission's jurisdiction pursuant to KRS 278.040(2).

The Joint Application states that a portion of GE's customer base is proposed to be transferred. It does not appear that GE's stock, or any facet of its business, is proposed to be transferred. On May 2, 1996, Joint Applicants filed a document entitled "Second Clarification of Application" ["Second Clarification"] which states unequivocally that "MIDCOM is only acquiring the opportunity to provide service to certain GE customers" [Second Clarification, at 2]. GE plans to continue to provide service "to its remaining customers in Kentucky pursuant to its tariff as filed with the Commission." Thus, it appears that GE plans to continue to offer Kentucky customers precisely the same services it offers now.

¹ Case No. 92-138, Application of Mid-Com Communications, Inc. for a Certificate of Public Convenience and Necessity to Operate as a Reseller of Telecommunications Services Within the State of Kentucky.

² Case No. 93-259, The Application of GE Capital Communications Corporation, d/b/a GE Exchange for a Certificate of Public Convenience and Necessity to Operate as a Reseller of Telecommunications Services Within the Commonwealth of Kentucky.

MIDCOM proposes to provide the transferred customers the same services and rates that GE provides.

Joint Applicants included in their April 22, 1996 filing a copy of the customer notice to be included in GE customer bills prior to the transaction. That notice informs the customers that GE and MIDCOM are completing an agreement "that will allow MIDCOM to provide your long distance service." The notice is somewhat misleading, since MIDCOM is already "allowed" to provide long-distance service in Kentucky to customers who request its service. The notice does not solicit the customers' authorization of this change of presubscribed interexchange carrier; it simply informs them that the change will take place. Joint Applicants have agreed, however, that GE "shall execute a master Letter of Authorization . . . in favor of MIDCOM" [Customer Base Purchase and Sale Agreement, Exhibit to Joint Application].

One issue is whether KRS 278.020(4) or KRS 278.020(5) apply to the transaction proposed by the Joint Applicants. KRS 278.020(5) prohibits any entity from acquiring control of any utility under the jurisdiction of the Commission without prior approval. KRS 278.020(4) requires Commission approval prior to the acquisition or transfer of ownership or control of a jurisdictional utility, "by sale of assets . . . or otherwise" However, no ownership or control of GE or any facet of its business is proposed to be transferred. Joint Applicants ask merely to transfer the service of some customers from GE to MIDCOM. The record does not indicate that GE has any proprietary interest in providing service to these

customers. While the Commission regulates transfers of control of utility service, or portions of utility service, to protect the public interest, on the facts of this case it does not appear that either KRS 278.020(4) or (5) applies.

Of great concern to the Commission, however, is that the parties do not intend to obtain the customers' authorizations for the PIC changes which will occur as a result of this transaction. The Commission has previously found, in Case No. 95-399,³ that switching a customer's PIC without his consent is an "unreasonable act" pursuant to KRS 278.260.

Citing Wats International Corporation v. Group Long Distance (USA), Inc., National Independent Carrier Exchange, James J. McKeeff and Sprint Communications Company, L.P. (F.C.C. File No. ENF-94-05, Order dated November 9, 1995), Joint Applicants state that there is no violation of Federal Communications Commission PIC change rules absent customer authorization when the entity serving the customers after the transaction is complete is the "successor in interest" to the seller [Second Clarification, at 5-6]. The Commission agrees with this statement. It would make no sense to attempt to force a carrier to continue to provide service it no longer wishes to provide simply because its customers did not want to change their PIC. Here, however, GE will continue to provide precisely the same service it currently provides to the customers whose PIC the Joint Applicants propose to change. In contrast, in

³ Case No. 95-399, Sevada Vowels/United Mortgage Co. v. MIDCOM Communications, Inc., Order dated March 26, 1996.

Wats International, the acquirer had bought the stock of the customers' original carrier, and thus was a genuine "successor in interest." Wats International did not concern a stand alone sale of customer accounts by an carrier which planned to continue to provide service to all its customers except those whose accounts it sold.

Joint Applicants argue that the Commission's denial of the authority sought in the Joint Application would subvert the FCC's Wats International decision and would require each customer's PIC change authorization prior to the sale of any telecommunications utility, whether by assets or stock. Joint Applicants are in error. Wats International is inapplicable. The customers were incidental to the sale of business in Wats International. Here, they are the subject of -- indeed, apparently the only subject of -- the transaction itself.

Consequently, the Commission finds that the authority sought in the Joint Application should be denied. MIDCOM may, of course, market its services and compete directly with GE in the telecommunications marketplace to obtain the business of these customers. However, it may not change customers' PICs on the terms described in the Joint Application.

IT IS THEREFORE ORDERED that authority to consummate the transaction described in the Joint Application is hereby denied.

Done at Frankfort, Kentucky, this 7th day of May, 1996.

PUBLIC SERVICE COMMISSION

Linda K Breathitt
Chairman

[Signature]
Vice Chairman

Robert M. Davis
Commissioner

ATTEST:

Don Hills
Executive Director